

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 12-12020-mg

6 | In the Matter of:

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8 | RESIDENTIAL CAPITAL, LLC, et al.,

19

10 | Debtors.

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14 | United States Bank

15

16 | New York, New York

17

18 | July 25, 2013

19 | 9:03 AM

21 | BEFORE

22 | HON. MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

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2 Status Conference, on the record, re: FGIC 9019 Settlement

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1 P R O C E E D I N G S

2 (Audio begins mid-sentence)

3 THE COURT: -- number 12-12020, here in connection
4 with a dispute concerning -- or, well, a dispute arising in
5 connection with the FGIC 9019 settlement proceeding; concerns
6 discovery from FGIC and Lazard regarding documents or
7 information that FGIC asserts is protected by the mediation
8 privilege.

9 Mr. Kerr?

10 MR. KERR: Your Honor, Charles Kerr of Morrison &
11 Foerster, on behalf of the debtors. Let me just frame the
12 issue. We're here on a request by FGIC to -- for an order
13 approving the production of a specific document under Federal
14 Rule of Civil Procedure 26(b)(4)(C) and Bankruptcy Rule
15 1914(c), in light of the confidentiality provisions in this
16 Court's order appointing mediator, dated December 26, 2012;
17 that's docket number 2519. Your Honor previously directed that
18 any 26(b)(4)(C) information be turned over. That document was
19 turned over yesterday during Mr. Pfeiffer's deposition. And
20 I'll let Mr. Sidman address that issue.

21 One issue I'd just like to note before I sit down,
22 Your Honor: In the objectors' letter that they sent to Your
23 Honor yesterday, they -- at the very end of the letter, they --
24 as Your Honor noted, they wrote and made a separate request
25 that they be allowed to take an additional fact witness of

1 Lazard. The debtor objects to that. Under this Court's
2 scheduling order, the Court had directed that the objectors
3 could take six fact depositions, and that deposition -- that
4 fact discovery had to be completed by July 17, 2013. They in
5 fact took six fact depositions. The request for Lazard came up
6 yesterday after the time period for fact discovery had been
7 completed. So I just want to make our position --

8 THE COURT: All right.

9 MR. KERR: -- clear on that, on the record.

10 THE COURT: Okay.

11 Mr. Sidman?

12 MR. SIDMAN: Good morning, Your Honor. Howard Sidman,
13 Jones Day, for FGIC. I just want to give you a little bit of
14 background here, just two minutes, to sort of explain why we're
15 here and what we want. During the mediation process, FGIC
16 created a document that analyzed the commutation proposal to --
17 in order to help evaluate that proposal. The -- that
18 information that FGIC created was then provided to the
19 trustees. The trustees then utilized that information and, now
20 clear that they're Trustees' expert, utilized that information
21 in valuating the merits of the commutation proposal and the
22 settlement agreement generally. FGIC withheld that document
23 from production because it was created by FGIC in connection
24 with the mediation, and we put it on our privilege log and we
25 believe it was -- and we still believe it is covered by the

1 mediation order issued by this Court.

2 Following Your Honor's direction at the -- it was the
3 July 17th hearing in this case -- to produce anything that Duff
4 & Phelps relied upon in its analysis, in its report, the
5 trustees, with FGIC's consent, reached out to counsel for the
6 investor objectors -- the objectors generally -- and tried to
7 enter into a stipulation whereby they could -- they, the
8 trustees, could produce this document that Duff & Phelps relied
9 upon, without violation or any waiver of the mediation -- the
10 confidentiality provisions in the mediation order.

11 We thought it was a relatively straightforward request
12 that would both protect our rights and obligations under the
13 order but allow them to review the document, inconsistent with
14 Your Honor's order. They didn't respond for a couple days.
15 The deposition of Mr. Pfeiffer was yesterday, so on -- I think
16 it was -- sorry, the days are confusing me now -- but I think
17 Tuesday I finally reached out and called counsel for the
18 objectors, both counsel at Willkie Farr and McKool Smith, and
19 asked them why we can't get this issue resolved. We were
20 unable to resolve the issue, so then we -- I guess it was
21 Monday evening -- Tuesday --

22 UNIDENTIFIED SPEAKER: Tuesday.

23 MR. SIDMAN: Tuesday evening --

24 Thank you.

25 Been a lot -- it's been a crazy few days. -- but

1 Tuesday evening, contacted the Court to see if we could get
2 this issue resolved via court order, because the mediation
3 order specifically says that any such deviations from --
4 paraphrasing -- any such sort of deviations from the
5 mediation -- the confidentiality provisions in the mediation
6 order should be authorized by the Court. So we thought that
7 was an appropriate way to handle this dispute.

8 We sent the letter to Your Honor I guess around 5 p.m.
9 on Tuesday evening. The deposition then proceeded with
10 Mr. Pfeiffer yesterday. During the course of the deposition,
11 it became clear to us that Mr. Pfeiffer not only -- and Duff &
12 Phelps, not only utilized this information in connection with
13 preparing its internal analysis to the trustees, but it also --
14 Mr. Pfeiffer also utilized this information, preparing his
15 report that he filed on July 19th in this case. When it became
16 clear to us that that's what happened, we then provided the
17 document to the objectors, for use at the deposition. The
18 document has been provided to the objectors.

19 THE COURT: Let me ask you this, Mr. Sidman --

20 MR. SIDMAN: Yeah.

21 THE COURT: -- and it may be that one of the other
22 counsel needs to address this issue: Is this the only analysis
23 prepared by or on behalf of FGIC, that was provided to Duff &
24 Phelps?

25 MR. SIDMAN: Your Honor, from my perspective, this is

1 the only document that I'm aware of.

2 THE COURT: Okay.

3 MR. SIDMAN: And so the reason why we're here now is
4 just because --

5 THE COURT: Oh, because Ms. Eaton's letter to the
6 Court suggests there are other documents as well --

7 MR. SIDMAN: Uh-huh.

8 THE COURT: -- and -- but we'll come to that. I want
9 all -- each of the counsel to address that and specifically
10 what Mr. Pfeiffer may have said in his deposition, in that
11 regard.

12 MR. SIDMAN: And I can tell you I was at
13 Mr. Pfeiffer's deposition, and I don't believe he identified
14 any other document that was provided -- was prepared by FGIC,
15 that he relied upon.

16 So here we are. We've produced the document. We just
17 don't want to have that production of the document be deemed a
18 violation of the confidentiality provisions of the mediation
19 order or some kind of broader waiver of the confidentiality
20 provisions of the mediation order. So that's the limited --
21 very limited request we're seeking here, Your Honor, to protect
22 ourselves --

23 THE COURT: All right.

24 MR. SIDMAN: -- basically.

25 THE COURT: Thank you, Mr. Sidman.

1 MR. SIDMAN: Yeah, thank you, Your Honor.

2 THE COURT: Let me hear from the -- I want to hear --
3 well, I'll give you a -- I want to hear from the FGIC trustee's
4 counsel. I don't know; Mr. Johnson, are you going to address
5 this?

6 MR. JOHNSON: Good morning, Your Honor. Michael
7 Johnson from Alston & Bird, on behalf of Wells Fargo. And of
8 course, I was the signatory on a letter that was sent to Your
9 Honor in accordance with Your Honor's directive yesterday
10 afternoon.

11 I agree with everything that Mr. Sidman has indicated.

12 THE COURT: Let me ask this very specifically.

13 MR. JOHNSON: Sure.

14 THE COURT: In connection with forming his opinion,
15 did Mr. Pfeiffer consider -- I'm using the word "consider", not
16 "rely" -- did he consider any documents prepared by or on
17 behalf of FGIC other than the commutation breakout that has not
18 been produced?

19 MR. JOHNSON: That has not been produced --

20 THE COURT: Yes.

21 MR. JOHNSON: -- no. To be clear, Your Honor, there
22 are other documents that he relied on, but they are public
23 documents.

24 THE COURT: Yeah. I --

25 MR. JOHNSON: And of course they've been produced.

1 THE COURT: This is what I want to be -- because
2 Ms. Eaton's letter suggests -- and this is what I want some
3 clarity about -- that in the course of the deposition,
4 Mr. Pfeiffer testified that there were other documents -- and
5 I'm going to broaden this a little bit -- either documents or
6 information provided by FGIC, that has not been disclosed, that
7 he considered it in preparing his -- informing his expert
8 opinions, because the Rules talk about considering rather than
9 relying upon, and that's why I want to draw that -- I want to
10 be careful in drawing that distinction.

11 MR. JOHNSON: Correct, Your Honor. The trustees have
12 always treated Rule 26(a)(2)(B), which has the documents --

13 THE COURT: Right.

14 MR. JOHNSON: -- consider -- or data considered by --
15 as applicable here. We turned over everything that was
16 considered by Duff, except for that one document which was
17 turned over yesterday. And the only reason that document was
18 not turned over, Your Honor, was because of the mediation order
19 and concerns that FGIC expressed to us that turning it over
20 could violate it. But now, Your Honor, as of yesterday, there
21 is nothing that Mr. Pfeiffer or Duff considered that has not
22 been turned over.

23 THE COURT: So what I -- Ms. Eaton attached to her
24 letter, as Exhibit A, the Pfeiffer expert report. And
25 attachment 2 to the expert report has a heading, "List of

1 Documents Considered". And I did not see the commutation
2 breakout identifi -- I may have missed it; it's a long --
3 and -- but I looked for it this morning.

4 I was in Washington for the last two days; that's why
5 you didn't get a hearing any sooner than that.

6 I looked for it; I didn't see it there. It is correct
7 also that on page 7 of the report, in paragraph 11, it says,
8 quote, "I reserve the right to update Attachment 2 as
9 additional documentation is reviewed and/or considered." So --
10 but is the commutation breakout listed? Did I miss it
11 somewhere?

12 MR. JOHNSON: Your Honor, I can't answer that
13 question. I'm not sure if my partner Kit Weitnauer can answer
14 that question --

15 THE COURT: All right.

16 MR. JOHNSON: -- off the top of his head.

17 So I don't know. This was prepared by Duff itself,
18 not by outside counsel.

19 THE COURT: All right. To the best --

20 MR. JOHNSON: I would have to get back to you.

21 THE COURT: Okay, but do you represent to the Court
22 that Duff, in connection -- did Mr. Pfeiffer, in connection
23 with forming his opinion and his work on it, consider any other
24 document or information provided by or on behalf of FGIC? And
25 I say "by or on behalf of" because if Lazard was FGIC's

1 advisor, if Lazard provided to Duff & Phelps information that
2 has not been disclosed, I want to know about that as well.

3 MR. JOHNSON: Your Honor, that is correct, what you
4 stated, that --

5 THE COURT: They did not?

6 MR. JOHNSON: -- I confirmed that and represent that
7 to the Court --

8 THE COURT: Okay.

9 MR. JOHNSON: -- that everything that was prepared or
10 given to Duff by FGIC has been disclosed.

11 THE COURT: Okay.

12 Mr. Weitnauer, did you want to add something?

13 MR. WEITNAUER: I just want to be clear, because I --

14 THE COURT: Just make your appearance.

15 MR. WEITNAUER: I'm sorry. I'm Kit Weitnauer. I'm
16 with Alston & Bird; one of Mike's partners.

17 You'll see on page 7 of Mr. Pfeiffer's report, he
18 references both an interview with Tim Travers, FGIC's CRO; an
19 interview with certain Lazard personnel. Those topics were
20 inquired into at the deposition --

21 THE COURT: All right.

22 MR. WEITNAUER: -- and he --

23 THE COURT: So there was no assertion of mediation
24 privilege --

25 MR. WEITNAUER: That's correct, Your Honor.

1 THE COURT: -- with respect to any of the
2 communications?

3 MR. WEITNAUER: That's correct.

4 THE COURT: All right. Thank you very much.

5 Go ahead.

6 MR. JOHNSON: Your Honor, from our perspective, the
7 trustees have fully complied with the requirements of --

8 THE COURT: All right.

9 MR. JOHNSON: -- Rule 26(a)(2)(B), and the materials
10 have all been turned over that were considered by Duff. And
11 also, we do have a second expert witness, Your Honor: Dr. S.P.
12 Kothari. I don't think there's been any allegation that
13 there's been some incomplete disclosure --

14 THE COURT: Okay.

15 MR. JOHNSON: -- with respect of his expert report.

16 Your Honor, I think what this comes down to actually,
17 but it's not very clear, I don't think, from the
18 correspondence, is work papers. And I don't think -- and
19 honestly, Your Honor, work papers are encompassed within the
20 Rule 26(a)(2)(B) language which talks about documents and
21 materials, or data and materials, that are considered, which I
22 think has traditionally been understood to mean the sources
23 that provided basically the foundation upon which the
24 information -- or the report or opinion is based.

25 But in any event, Your Honor, while we have been clear

1 in our position that work papers aren't covered by that Rule,
2 we have turned over work papers. I brought today, Your Honor,
3 a stack. It's very hard to print them out, because it's
4 several Excel spreadsheets; but they're sitting there on the
5 table, and you can see them. Significant work papers have been
6 disclosed already. I note that we have provided information --
7 we have identified them by Bates numbers this week -- to
8 counsel for the objectors.

9 Nonetheless, those work papers were not the subject of
10 any of the examination of Mr. Pfeiffer yesterday. We've not
11 been told, with any specificity, that there is anything
12 incomplete about those work papers. And Mr. Pfeiffer was not
13 asked whether there were any holes in what's been produced, or
14 anything else.

15 So, Your Honor, quite frankly, we --

16 THE COURT: So, when --

17 MR. JOHNSON: -- are at a loss to understand --

18 THE COURT: -- when you talk about this issue about
19 work papers, the Rule doesn't specifically address it. But the
20 reporter's note -- or the advisory committee note -- not
21 reporter's note -- talks about -- my takeaway from it is that
22 discovery is permitted about any alternative analyses, testing
23 methods or approaches to the issues on which the expert will be
24 testifying, whether or not the expert considered them in
25 forming the opinions expressed. And that seems to me to go to

1 what would ordinarily be work papers doesn't appear in the
2 report. But you're representing that work papers have been
3 produced and, if any more are identified, you'll produce them
4 as well?

5 MR. JOHNSON: Well, Your Honor, I think that we -- the
6 second part I think we might have a problem with. I mean, the
7 analysis, Your Honor, is very sophisticated. We have provided
8 what we consider to be the primary work papers. We don't know
9 what further information they might be looking for, but there
10 may be layers of information below that that we -- that have
11 not been produced. For example, there may be spreadsheets that
12 might feed into the base work paper documents that are
13 documents. And, Your Honor, quite honestly, producing that
14 would be very, very cumbersome. And again, we don't know if
15 there's --

16 THE COURT: It's actually pretty easy; you produce
17 worksheet -- Excel spreadsheets electronically; that's not very
18 cumbersome. But that's not the issue that I consider before me
19 today. What I consider before me today is really the issue of
20 whether FGIC and/or Lazard is required to disclose any
21 additional documents or information that would otherwise be
22 protected by the mediation privilege; that's what seems to me
23 to be framed by the letters. And I know that Ms. Eaton's
24 letter does address the work product issue, but I don't believe
25 that's properly framed before me at this point.

1 MR. JOHNSON: And, Your Honor, I can --
2 THE COURT: I don't want to get into --
3 MR. JOHNSON: I don't know why their work product --
4 THE COURT: Mr. Johnson, I don't want to get --
5 MR. JOHNSON: There's nothing to produce.
6 THE COURT: I don't want to get into it --
7 MR. JOHNSON: Okay.
8 THE COURT: -- further now, okay?
9 MR. JOHNSON: Understood, Your Honor. Understood,
10 Your Honor.

11 THE COURT: All right, let me hear from the
12 rehabilitator's counsel.

13 MR. SLACK: Good morning, Your Honor. Richard Slack
14 from Weil Gotshal, for the rehabilitator of FGIC.

15 And I just had one clarification which -- something
16 Your Honor had said, and that is that Lazard -- it's an
17 important distinction --

18 THE COURT: Okay.

19 MR. SLACK: -- for my client. But Lazard was retained
20 by Weil --

21 THE COURT: Right.

22 MR. SLACK: -- to work for the rehabilitator --

23 THE COURT: I stand corrected.

24 MR. SLACK: -- not for FGIC.

25 THE COURT: I stand corrected.

1 MR. SLACK: Well, and the reason it's important, Your
2 Honor, is that there's a lot of work that Lazard has done that
3 FGIC has not had access to, FGIC's management has not had
4 access to. FGIC's management doesn't direct Lazard. And so
5 it's not really the same as FGIC, dealing with Lazard.

6 What I can tell the Court, Your Honor, is that Lazard
7 did not provide any documents to the trustees, to the debtors.
8 And so the only document that I understand was at issue here
9 was a document that was actually prepared by FGIC, as
10 Mr. Sidman said, that was sent to the trustees and then handed
11 over.

12 I guess, in point of full disclosure, I would say that
13 Lazard did meet -- and I think this came out in the
14 deposition -- with representatives of Duff & Phelps, for an
15 hour and a half, roughly. My understanding is that, because
16 the -- some of the clients of Duff & Phelps had not signed a
17 confidentiality (sic), at the beginning of the meeting the
18 Lazard representatives said, 'We are not discussing anything
19 that's not public.' And I'd been told by counsel for Lazard
20 that in fact that's what happened; there was not any
21 information that was provided that wasn't public information.
22 And --

23 THE COURT: May I ask you this, Mr. Slack: Were you
24 at Mr. Pfeiffer's deposition?

25 MR. SLACK: I wasn't. What I understand -- and I'll

1 let somebody talk, but what I understand is that Mr. Pfeiffer,
2 who wasn't at that meeting, said that he could not identify --
3 and again, I'll let somebody talk to it -- any information that
4 was not public, that was provided to Duff & Phelps. But again,
5 I'll let somebody who was at the deposition talk to it.

6 THE COURT: All right.

7 Mr. Sidman, briefly --

8 MR. SIDMAN: Yeah. Just --

9 THE COURT: -- before I hear from Ms. Eaton.

10 MR. SIDMAN: Just to follow on what Mr. Slack just
11 said, I actually specifically asked the question to
12 Mr. Pfeiffer at the deposition yesterday: if he could identify
13 any nonpublic information that Duff & Phelps received from
14 Lazard in connection with the preparation of his report, and he
15 could not.

16 THE COURT: Okay, thank you.

17 Ms. Eaton?

18 MS. EATON: Good afternoon, Your -- or good morning,
19 Your Honor. Mary Eaton on behalf of the investors in the FGIC
20 wrapped trusts.

21 I have to confess to the Court, all of this is a
22 little confusing from our perspective. We were -- we certainly
23 were not aware, and nobody informed us, that the document at
24 issue was the only document that had been supplied by either
25 FGIC or its advisor Lazard. And frankly, it seemed somewhat

1 inconsistent with the facts --

2 THE COURT: We'd just been told by Mr. Slack that
3 Lazard is not FGIC's advisor; it's the rehabilitator's --

4 MS. EATON: I beg your pardon --

5 THE COURT: -- advisor.

6 MS. EATON: -- Your Honor. Yeah.

7 THE COURT: You don't dispute that, do you?

8 MS. EATON: I have no basis to --

9 THE COURT: Okay.

10 MS. EATON: -- dispute it --

11 THE COURT: All right. Go ahead.

12 MS. EATON: -- Your Honor. I simply -- I misspoke.

13 THE COURT: All right.

14 MS. EATON: What we do have -- leaving the work papers
15 issue aside, what we do have are certain indications that other
16 information, apart from the document at issue, was provided to
17 Duff & Phelps, including information that was not confidential.
18 The witness yesterday was asked a series of questions designed
19 to clarify what information was provided by whom and when, but
20 on several occasions was unable to answer those questions,
21 including because, for instance, he was not present at the
22 due -- initial due-diligence meeting with Duff & Phelps, that I
23 believe happened in April.

24 What the witness did testify to was that member -- and
25 I can pull out the testimony if the Court would find that

1 beneficial -- that while he was not at that meeting, members of
2 his team were there and that he did not know whether they had
3 any documents or notes of the meeting, one way or the other.

4 With respect to the provision of confidential --

5 THE COURT: Which meeting are you referring to?

6 MS. EATON: The due-diligence meeting that took place
7 between representatives of Duff & Phelps, representatives of
8 Lazard, and representatives of FGIC. I believe it was at the
9 beginning of April and it was -- there was an agenda; there was
10 a list of diligence items that were to be discussed in
11 connection with Duff & Phelps' analysis of the -- what was then
12 the proposed FGIC settlement agreement.

13 THE COURT: So do you have any evidence that any
14 nonpublic information was provided by Lazard at the meeting?

15 MS. EATON: The only evidence we have, Your Honor, is
16 the statement of Mr. Pfeiffer at paragraph 14 of his expert
17 report, where he says that --

18 THE COURT: Let me turn to it, okay? Hold on. Go
19 ahead.

20 MS. EATON: -- quote, "D&P was asked by the FGIC
21 trustees to advise them regarding D&P's assessment of the
22 reasonableness, risks and benefits of accepting the proposal,
23 in part, on confi" -- "based in part on confidential
24 information communicated by FGIC's chief restructuring officer
25 and Lazard, financial advisors to Weil Gotshal, counsel to the

1 New York Liquidation Bureau. D&P performed an independent
2 financial analysis to determine a reasonable range of the value
3 of projected payments to the FGIC insured trust, based on the
4 rehabilitation plan."

5 So the expert's report of the representative from Duff
6 & Phelps is stating, in our view, clearly here that their
7 analysis was based in part on confidential information that was
8 provided by FGIC and Lazard. But apart from that, I don't know
9 of anything, Your Honor. Most of these items, including the
10 document in question, was not identified to us; it was not
11 logged as privileged --

12 THE COURT: Well, that doesn't indicate --

13 MS. EATON: -- either by --

14 THE COURT: He doesn't say anything about document; it
15 says "information". So there may not be a document.

16 MS. EATON: There may or may not be, Your Honor; we
17 don't have any way of knowing, including based on the testimony
18 of Mr. Pfeiffer that I was referencing a moment ago. And it
19 could very well be that members of his team have documents, but
20 that we don't know; he could not say one way or the other.

21 So we're a little bit in the dark about this. There
22 are indications that there should be -- if there weren't
23 documents sent by FGIC or Lazard, that there was information
24 imparted by FGIC or Lazard that Duff & Phelps considered in
25 rendering its opinions and, in our submission, that

1 information -- we're entitled to discovery of that information,
2 as well as other information, in order to effectively cross-
3 examine the trustee's expert with regard to the advice they got
4 on whether to approve the FGIC settlement agreement --

5 THE COURT: Well, did you --

6 MS. EATON: -- or not.

7 THE COURT: -- did you examine Mr. Pfeiffer about all
8 of the data analysis, summaries, whatever, that he considered
9 in forming his opinions?

10 MS. EATON: Well, two things, Your Honor: First, it
11 was my partner Mr. Baio, not myself, who --

12 THE COURT: Okay.

13 MS. EATON: -- who took that deposition. I don't know
14 that the witness was presented with every document we were --

15 THE COURT: I didn't ask whether he was presented with
16 every document.

17 MS. EATON: I realize that, Your Honor. I'm trying to
18 be responsive to the Court's question.

19 The witness was repeat -- I read the transcript last
20 night; the witness was repeatedly questioned about the
21 existence of documents that they either were -- that Duff &
22 Phelps was either supplied with or generated in the course
23 of --

24 THE COURT: Well, the issue isn't "reviewed"; the
25 issue is "considered in forming his opinions".

1 MS. EATON: Correct, Your Honor.

2 THE COURT: You agree with that?

3 MS. EATON: I certainly do. And it's interesting --

4 THE COURT: So, frequently in a situation,

5 particularly where somebody starts out as a consulting expert,
6 you may get a ton of documents; it doesn't mean you considered
7 them in forming your opinions.

8 MS. EATON: That may well be the case in a great many
9 circumstances here, Your Honor, although I would point out that
10 there's one very significant issue, that bears directly on the
11 opinion of Duff & Phelps in this case, that we believe relates
12 to the work that they -- that Duff & Phelps did as a consulting
13 expert and is critical to our ability to challenge that expert
14 testimony, and that goes to Duff & Phelps' determination not to
15 ascribe any value to the representation and warranty claims
16 that FGIC had. According to the test -- we have not been
17 provided with any analysis of why Duff & Phelps made that
18 determination and gave zero value to those claims, claims that
19 I understand FGIC has itself stated are worth in excess of a
20 billion dollars.

21 According to the testimony, Duff & Phelps -- I could
22 get the precise page -- spent months and months analyzing these
23 claims and their value, and, oddly enough, not a single scrap
24 of paper has been --

25 THE COURT: That doesn't entitle you --

1 MS. EATON: -- supplied to us.

2 THE COURT: But whether -- we'll see whether that's
3 true or not; but assuming it is, you've got grist for cross-
4 examination of Mr. Pfeiffer at trial. What you don't have is a
5 basis to require FGIC to produce documents or information that
6 were not provided to Mr. Pfeiffer and which he considered in
7 preparing his opinion. I mean, your -- the problem with your
8 letter, frankly, is you're like a broken record, Ms. Eaton.
9 What you want to do is break into the mediation and find out
10 everything that happened in a confidential mediation. That
11 you're not going to do. Okay?

12 So you correctly recite in your letter many of the
13 applicable principles that the Court has to consider in
14 resolving this dispute, but you carry it well beyond the facts
15 that you have to support your arguments.

16 With respect to -- if there are --

17 Mr. Johnson, if Duff & Phelps considered documents or
18 information in connection with forming its opinions, it has to
19 be provided, okay? You've represented you've done that.
20 You've represented you've done that, and I have no reason to
21 believe that you haven't. And if there is additional
22 information that comes to light, you need to provide it, okay?

23 So Ms. Eaton points to page 8 of the report, the
24 Pfeiffer report, paragraph 14, and the sentence that begins
25 "Based in part on confidential information communicated by

1 FGIC's chief restructuring officer and Lazard, financial
2 advisors to Weil, Gotshal & Manges," et cetera, "D&P performed
3 an independent financial analysis."

4 So if there is confidential information that Duff &
5 Phelps received and considered in its analysis, it has to be
6 provided. I mean, it's -- that's the reality of it.

7 MR. JOHNSON: May I -- may I address that, Your Honor?

8 THE COURT: Yeah, go ahead.

9 I'll give you a chance, Ms. Eaton, to say some more,
10 but let me --

11 MR. JOHNSON: Yeah, I'll just stress this one issue,
12 Your Honor. Mr. Pfeiffer's report refers to confidential
13 information, and he used that word, Your Honor, because --

14 THE COURT: You have to go up to the microphone.

15 MR. JOHNSON: Oh, this one --

16 THE COURT: We're not -- we're not picking it up.

17 MR. JOHNSON: I'm sorry, Your Honor.

18 THE COURT: Okay. Go ahead.

19 MR. JOHNSON: Mike Johnson again.

20 THE COURT: It's because you're tall is what Karen
21 said.

22 MR. JOHNSON: Mike Johnson again, Your Honor.

23 Mr. Pfeiffer's report at paragraph 14, which is what
24 Ms. Eaton cited to you, refers to confidential information
25 which I think -- I don't know if it's the same thing that Mr.

1 Slack, a nonpublic. The reason Mr. Pfeiffer referred to
2 confidential information was because FGIC required Mr. Pfeiffer
3 and his firm to sign an NDA, so in an abundance of caution, he
4 treated at least some of the information as confidential. It
5 refers solely to the existence of an NDA, not any
6 characterization as public or nonpublic.

7 THE COURT: I'm sure, Mr. Johnson, this issue is going
8 to come up again at trial, if not sooner, so head it off at the
9 pass. Go back to Mr. Pfeiffer and his people at Duff & Phelps
10 and confirm again because I'm sure, if he testifies at trial,
11 he's going to be asked in cross-examination about it. So
12 what's -- you know, get some clarity and communicate with Ms.
13 Eaton about that.

14 MR. JOHNSON: Your Honor, for the record, I have gone
15 back again, not just to Mr. Pfeiffer but to his team members
16 and confirmed --

17 THE COURT: All right.

18 MR. JOHNSON: -- that we have turned over all
19 documents considered.

20 THE COURT: All right. Ms. Eaton, I interrupted you,
21 so is there anything else you wanted to add?

22 MS. EATON: Just briefly, Your Honor. We were told
23 before the exchange of letters took place that documents --
24 nonprivileged documents that had been relied upon by the expert
25 had been produced to us, and at the deposition yesterday of Mr.

1 Pfeiffer, the witness was repeatedly instructed to confine his
2 answers to information that he relied upon from Lazard and FGIC
3 and whomever else. If there's confusion here about whether
4 documents that the expert considered, which is a broader --

5 THE COURT: Yes.

6 MS. EATON: -- universe of documents than those he
7 relied upon, you know, respectfully, it's -- that is as a
8 result of the instructions given to the witness and what we
9 were told previously, if indeed everything that the expert had
10 considered in rendering his opinions, including information
11 that either received or generated in his role as a consulting
12 expert were considered in rendering his opinions, our view is
13 simply that it needs to be produced and --

14 THE COURT: Let me ask you this. First off, can
15 somebody confirm whether he was limited to testifying yesterday
16 about information upon which he relied as opposed to
17 considered --

18 MR. SIDMAN: Yes. If I can --

19 THE COURT: -- because the Rule does draw a
20 distinction -- I mean, that certainly the advisory committee
21 note clearly draws a distinction --

22 MR. SIDMAN: Your Honor --

23 THE COURT: -- between considered and relied.

24 MR. SIDMAN: -- I -- you're absolutely right, Your
25 Honor, and -- this is Howard Sidman from Jones Day. I gave the

1 instruction, Your Honor, at the deposition yesterday, and I
2 used the word "rely". So there's no reason to -- and I was --
3 it was a mistake on my part and --

4 THE COURT: Here is what I -- with respect to this
5 issue, confer with Ms. Eaton, yeah, after the conclusion of the
6 hearing. If she wishes -- you know, it seems to me there's two
7 ways to deal with this. You can either, if she's willing -- if
8 she's satisfied with this, get a declaration from Mr. Pfeiffer
9 that addresses the issue of what they considered. And if you
10 do that and the answer is, there's nothing other than the one
11 document, I'm going to allow Ms. Eaton to decide whether she
12 wants to resume the Pfeiffer deposition for no more than an
13 hour because it's really just this one point; it shouldn't even
14 take that long. But she's entitled because I think, to the
15 extent that you instructed that he address -- that he identify
16 only things they relied on, I think that was not consistent
17 with the Rule. Let me just put it that way.

18 MR. SIDMAN: I understand, Your Honor, and that was --

19 THE COURT: Okay. So I'm going to leave that for the
20 two of you, all of you, to see if you can resolve.

21 MR. SIDMAN: Yeah.

22 THE COURT: And if necessary, Ms. Eaton can resume the
23 deposition on that point.

24 MR. SIDMAN: Thank you, Your Honor.

25 THE COURT: All right.

1 MR. SIDMAN: I will say though that there was at least
2 two hours of examination on this particular issue of the
3 meeting. So there's been an opportunity to have this
4 disclosure.

5 THE COURT: Well --

6 MR. SIDMAN: And we'll figure out the consideration
7 versus relied issue.

8 THE COURT: -- let's get some clarity on this issue.

9 MR. SIDMAN: Yes.

10 THE COURT: All right. Anything else anybody wants to
11 add quickly?

12 Ms. Eaton.

13 MS. EATON: A question, Your Honor, two questions.
14 We'd like some guidance about the -- how to tee up the issue of
15 the Lazard deposition.

16 THE COURT: Well, first, let me -- you can't. That --
17 I'm teeing up that issue -- that I'm resolving. Discovery
18 closed. You had your chance if you wanted to depose Lazard,
19 you thought you -- if you thought you were entitled to. You
20 had your chance to do it so I'm not altering the schedule that
21 was previously approved. So that resolves that issue.

22 MS. EATON: May I say, Your Honor, I -- before the
23 close of discovery, I spoke with counsel for Lazard who
24 themselves suggested to me that we should await the Duff &
25 Phelps deposition, and if the Lazard deposition we still felt

1 it was necessary after that, that we could discuss it at that
2 time.

3 THE COURT: Well, that's good. I'm glad you're
4 discussing it with Lazard and its counsel, but nobody raised
5 the issue with me. I set a discovery schedule; that's the
6 discovery schedule. I'm not altering it. So that's the answer
7 with respect to the Lazard.

8 MS. EATON: Very well, Your Honor. And with respect
9 to the separate issue of the work papers that Your Honor
10 indicated was not right --

11 THE COURT: That issue is not sufficiently presented
12 to me at this point. Mr. Johnson has represented that some
13 volume of work papers were provided. You need to confer with
14 him further. Hopefully, you'll resolve -- be able to resolve
15 this issue without further court intervention.

16 MS. EATON: Thank you, Your Honor.

17 THE COURT: All right. So, pending before the Court
18 is a dispute between the objecting partying, and the objecting
19 parties are identified in Ms. Eaton's July 24th, 2013 letter.
20 It's a dispute between the objecting parties on the one hand
21 and FGIC and the FGIC trustees on the other hand concerning
22 whether FGIC and Lazard must produce additional documents and
23 permit the deposition of Lazard in matters that are otherwise
24 protected by the mediation privilege. The Court received and
25 reviewed letter briefs from the parties last night and

1 scheduled a hearing for this morning.

2 With respect to the letters, I'm referring to -- all
3 three letters are dated July 24, 2013. It's a letter from
4 Ms. Eaton at Willkie Farr, a letter from Mr. Sidman at Jones
5 Day, and a letter from Mr. Johnson at Alston & Bird.

6 During the deposition of Allen Pfeiffer, an expert
7 within retained by the FGIC trustees, FGIC produced a one-page
8 document bearing the legend "FGIC-ResCap-trusts commutation
9 break-out." It appears that this document was considered by
10 Pfeiffer in forming his expert opinions and in preparing his
11 expert report.

12 "An expert must provide discovery of the opinions to
13 be offered by the expert and the development, foundation, and
14 basis of those opinions. Communications the expert had with
15 anyone other than the parties' counsel about the opinions also
16 must be disclosed.

17 "Discovery is permitted without any alternative
18 analyses, testing methods or approaches to the issues on which
19 the expert will be testifying whether the expert considered them
20 in forming the opinions expressed. Discovery is also permitted
21 to identify facts or data provided to the expert and that the
22 expert considered in forming the opinions expressed. Discovery
23 is also permitted to identify any assumptions that the expert
24 relied upon in forming the opinions to be expressed.

25 "Such information is discoverable, even if it results

1 from an attorney-client privileged communication. But where
2 the communication comes from counsel for the party on whose
3 behalf the expert will testify, this exception is limited to
4 those assumptions that the expert actually did rely on in
5 forming the opinions to be expressed."

6 The issue here is whether Pfeiffer "considered" any
7 other documents or information provided by FGIC or on behalf of
8 FGIC in forming his opinions. If the one-page commutation
9 break-out is the only such document that Pfeiffer considered,
10 no other documents must be produced. If Pfeiffer considered
11 other FGIC documents which had been withheld from production,
12 one of two things must happen. If the documents and
13 information are disclosed, Pfeiffer may testify at trial. If
14 the documents are not disclosed, Pfeiffer may not testify at
15 trial. The mediation privilege remains a proper basis on which
16 FGIC may refuse production of documents or information that are
17 properly the subject of the mediation privilege.

18 Pfeiffer was originally selected as a consulting
19 expert rather than as a testifying expert. It is typical for
20 consulting experts to be given access to information that may
21 not be provided to testifying experts, but if the information
22 is provided to a testifying expert who has considered it in
23 forming expert opinions, information must be disclosed or the
24 expert may not testify.

25 Pfeiffer's report includes "attachment to" with the

1 heading "list of documents considered". The commutation
2 break-out does not appear to be on the list, but Pfeiffer's
3 expert report in paragraph 11 states that, "I reserve the right
4 to update the list as additional documentation is reviewed
5 and/or considered."

6 During the deposition, at or prior to the deposition,
7 it was disclosed that the one-page commutation break-out was
8 considered by Mr. Pfeiffer and was provided at the time of the
9 deposition.

10 The question now is whether Pfeiffer considered other
11 documents or information provided by or on behalf of FGIC that
12 have not been disclosed through document production or
13 deposition testimony. If the answer is no, then Pfeiffer may
14 testify at trial. If the answer is yes, then Pfeiffer may not
15 testify at trial unless the additional documents or information
16 are disclosed.

17 The Court concludes that by permitting disclosure of
18 the one-page commutation break-out, FGIC has not provided a
19 subject matter waiver of any applicable privilege including
20 mediation privilege. This is not a situation where FGIC is
21 seeking to use an assertion of privilege as a sword and a
22 shield. Pfeiffer is testifying on behalf of the FGIC trustees,
23 not on behalf of FGIC or the FGIC rehabilitator. Properly
24 considered, the issue here is whether Pfeiffer may be permitted
25 to provide expert testimony at trial. That is the issue and

1 the only issue the Court needs to resolve.

2 Since the parties were unable to reach agreement on
3 the form of the stipulation, I will not enter an order based on
4 the stipulation; however, by my ruling today, the Court
5 concludes that FGIC has not waived its mediation privilege with
6 respect to any other documents than the one page that was
7 provided. The record will be so ordered, and no separate order
8 will be entered based on the ruling.

9 All right. Let me go back to the work product -- the
10 work papers issue. With respect to the work papers, I expect
11 that you'll cooperate with Ms. Eaton and -- so that you can
12 assure her that the work papers have been provided to the
13 extent that, as I indicated, discovery is permitted, disclosure
14 is required with respect to any alternative analyses, testing
15 methods or approaches to the issues on which the expert will be
16 testifying.

17 So if there are work papers that include such
18 alternative analyses, testing methods or approaches to the
19 issues on which the expert will be testifying, they must be
20 produced. To the extent that the work papers reflect drafts of
21 the expert report that has been provided, doesn't the Rule --
22 the Rule was amended in 2010 to make clear that the drafts
23 don't have to be provided. So if the work papers reflect
24 drafts of the report, they don't have to be provided. If they
25 reflect alternative analyses, et cetera, that are not included

1 in the report, they do have to be provided.

2 That's going to be the Court's disposition and ruling,
3 and the transcript is so ordered.

4 Okay. We're going to take a ten-minute recess before
5 I start the regular calendar.

6 MR. JOHNSON: Thank you, Your Honor.

7 UNIDENTIFIED SPEAKER: I know you're taking a recess.
8 I don't think there's any other ResCap matters on this morning;
9 is that correct?

10 THE COURT: There are. We're back tomorrow.

11 UNIDENTIFIED SPEAKER: That -- I'll leave that to my
12 partners.

13 THE COURT: Leave that to your partners for tomorrow.

14 UNIDENTIFIED SPEAKER: Okay. Thank you, Your Honor.
15 Appreciate it.

16 UNIDENTIFIED SPEAKER: Every day seems to be a ResCap
17 day.

18 (Whereupon these proceedings were concluded at 9:48 AM)

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2 I N D E X

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RULINGS

5

Page Line

6 FGIC has not waived its mediation privilege
7 with respect to any other documents than the
8 one page that was provided.

36 5

9 If the work papers reflect drafts of the
10 report, they don't have to be provided. If
11 they reflect alternative analyses, et
12 cetera, that are not included in the report,
13 they do have to be provided.

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2 C E R T I F I C A T I O N

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4 I, David Rutt, certify that the foregoing transcript is a true
5 and accurate record of the proceedings.

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DAVID RUTT

AAERT Certified Electronic Transcriber CET**D-635

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17 Date: July 25, 2013

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